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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	CC Docket No. 96-149

PETITION FOR RECONSIDERATION AND CLARIFICATION

Pursuant to Section 1.429 of the Commission's Rules, AT&T Corp. ("AT&T") hereby requests that the Commission reconsider or clarify its First Report and Order[1] in this proceeding, in the one respect described below.

The Commission's Order establishes rules implementing the non-accounting structural separation, transactional, and nondiscrimination requirements that § 272 of the Act imposes in connection with, *inter alia*, a BOC's provision of in-region interLATA services. As the Order recognizes, Congress sought by enacting § 272 to protect against the risk that the BOCs would use any market power they retain when they enter previously prohibited markets to engage in discrimination, cost misallocations, and price squeezes that harm competition and

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1 First Report and Order and Further Notice of Proposed Rulemaking, Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Telecommunications Act of 1934, as Amended, CC Docket No. 96-149, FCC 96-489, released December 24, 1996 ("Order").

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customers.[2] Although, as the Commission recognizes, "no regulatory scheme can completely prevent or deter discrimination"[3] or other misconduct, § 272's safeguards are a key means to reduce opportunities for such anticompetitive conduct, and to increase prospects for detection if it occurs. Accordingly, it is critical that the Commission implement that section in a fashion that provides the full panoply of protections that Congress intended.

In this petition, AT&T seeks reconsideration and clarification of a single aspect of the Commission's order.[4] Specifically, § 272(b)(1) requires that a BOC affiliate established pursuant to § 272 "shall operate independently from the [BOC]." The Commission's interpretation of § 272(b)(1), however, appears[5] to allow a BOC and its § 272 affiliate, directly or through a third entity, jointly to perform many functions integral to the provision of exchange, exchange access, or interLATA services, giving rise to the very opportunities for cross-

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2 Order, ¶¶ 9-13.

3 Id., ¶ 19.

4 In its comments on the FNPRM released concurrently with the Commission's Order, AT&T proposes disclosure requirements to implement § 272(e)(1)'s nondiscrimination requirements. See AT&T Comments, filed February 19, 1997. AT&T believes that the reporting requirements it advocates, including certain quality of service measures, are necessary fully to implement § 272(e)(1)'s nondiscrimination requirements. Nonetheless, if the Commission concludes that § 272(e)(1) does not require disclosure of all of these data, then, for the reasons set forth in its FNPRM comments, AT&T hereby petitions the Commission to reconsider its conclusion not to impose reporting requirements pursuant to the remaining nondiscrimination requirements of § 272, and incorporates its comments on the FNPRM herein by reference. See Order, ¶¶ 321-38.

5 The Order is not entirely clear in this regard. The Commission explicitly authorizes integrated marketing activities, See Order, ¶ 183("the parent of a BOC and its section 272 affiliate or another BOC affiliate may perform marketing functions for both entities"), yet also makes explicit that, to the extent a function is an "integral part" of an activity subject to § 272, it "must be conducted through the section 272 affiliate." Id., ¶ 169.

subsidization and discrimination that § 272 was designed to eliminate. AT&T therefore asks the Commission to reconsider its rules implementing § 272 so as to clearly prohibit a BOC and its § 272 affiliate from integrating functions such as marketing, sales, advertising, service design and development, product management, facilities planning, and other activities, such that the BOC and its § 272 affiliate "could not reasonably be found to be operating independently,"[6] or to clarify that its current order prohibits such integration.

ARGUMENT

I. The Order Is Contrary To The Plain Language Of Section 272(b)(1)

The Commission correctly found that § 272(b)(1)'s mandate that a § 272 affiliate "operate independently" imposes requirements that go beyond the other structural and transactional restrictions ordered by § 272(b).[7] However, the Order specifies just four requirements to implement § 272(b)(1), ruling that the section prohibits: (i) joint ownership by a BOC and its § 272 affiliate of transmission, switching, and other facilities used to provide local exchange and exchange access service; (ii) joint ownership of the land and buildings where those facilities are located; (iii) performance by the § 272 affiliate of operating, installation, and maintenance functions associated with BOC facilities; and (iv) performance by the BOC or its other affiliates of operating, installation, and maintenance functions associated with facilities that the § 272 affiliate owns or obtains from a third party.

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6 See id., ¶ 158.

7 Specifically, § 272(b)(2) requires separate books, records, and accounts; § 272(b)(3) requires separate officers, directors, and employees; § 272(b)(4) requires separate credit; and § 272(b)(5) requires that transactions be conducted on arm's length basis, and reduced to publicly available writings.

No reasonable interpretation of § 272(b)(1) admits the conclusion that the Commission's four restrictions alone are consistent with the plain language of that provision. While the Commission enjoys some discretion to shape the precise contours of Congress' mandate that BOCs and their affiliates "operate independently," it is clear that merely limiting the joint ownership, operation, and maintenance of network facilities is inconsistent with the ordinary meaning of that phrase. A BOC and its affiliate that comply with these requirements cannot remotely be deemed to "operate independently" if they nonetheless engage on an integrated basis in other functions essential to the provision of exchange, exchange access, and interLATA services, such as service design, facilities planning and other activities.[8]

II. The Commission Failed To Offer Sufficient Support For Its Interpretation of Section 272(b)(1)

Even if the Order's interpretation of § 272(b)(1) were not inconsistent with the plain language of that section, the Commission failed to provide adequate reasons to support its reading. The Order states that the four restrictions it imposed are necessary to prevent a BOC from "substantial[ly] integrat[ing]" its facilities with those of its affiliate.[9] In particular, "[i]n order to protect against the potential for a BOC to discriminate in favor of a section 272 affiliate in a manner that results in the affiliate's competitors' operating less efficiently," the Order imposes

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[8] It is equally clear that it would be inconsistent with the plain meaning of § 272(b)(1) for a BOC and its § 272 affiliate to conduct these core functions through a third entity, such as by transferring network maintenance activities to another BOC affiliate. Section 272(b)(1) unequivocally requires independent operation, not merely the maintenance of separate corporate shells. Thus, the Commission should also clarify that its Order does not permit a BOC and its § 272 affiliate to subvert Congress' intent by shifting functions to one of their corporate siblings and thereby integrating their operations indirectly.

[9] See, e.g., Order, ¶¶ 159, 163.

restrictions "to ensure that a section 272 affiliate and its competitors enjoy the same level of access to the BOC's transmission and switching facilities."[10]

Preventing such discrimination is unquestionably one of the purposes of § 272. However, the Order improperly substitutes this limited goal for the Act's broader and unqualified mandate that the § 272 affiliate and its BOC "operate independently." Indeed, the Order never addresses whether the four restrictions it imposes are sufficient to achieve the operational independence required by the statute. Instead, the Commission attempts to conduct a balancing test whereby it weighs "operational independence" requirements against the efficiencies that integration might provide to BOCs and their § 272 affiliates, and then judges the results by some standard that it never adequately identifies, much less explains. In fact, the Commission expressly declined to impose further requirements pursuant to § 272(b)(1) because it concluded that permitting BOCs and their affiliates to integrate their operations in other respects would permit them to "derive economies of scale and scope."[11]

The plain language of § 272(b)(1) provides that the standard against which the Commission must measure separations requirements is that a BOC and its affiliate must "operate independently." The Commission simply is not authorized to alter the balance that Congress already has struck. The Order does not even seek to tie the measures it imposes to the statutory

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10 Id., ¶ 158.

11 Id., ¶ 168.

standard. Accordingly, it does not -- and cannot -- adequately explain why the four requirements it imposes ensure operational independence.[12]

III. The Commission's Interpretation Of "Operate Independently" In Section 272(b)(1) Also Fails To Take Into Account The Requirements of Section 274(b)

Like § 272(b)(1), section 274(b) of the 1996 Act mandates that certain BOC affiliates be "operated independently." In addition, sections 274(b)(1) through (b)(9) provide a list of nine specific requirements that the Commission has found fully define the "operate independently" requirement of § 274(b).[13] Although AT&T disagrees with the Commission's conclusion that § 274(b)'s nine subsections were intended as an exhaustive list of requirements relating to that provision,[14] subsections 274(b)(1) through (b)(9) nevertheless impose significantly more stringent restrictions than does the Commission's interpretation of the same operative language in § 272(b)(1). The instant Order simply does not offer a reasoned justification for this strained interpretation.

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12 Cf., e.g., Bowman Transp., Inc. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974) (agency must provide a "rational connection between the facts found and the choice made").

13 Compare Order, ¶ 156 with First Report and Order and Further Notice of Proposed Rulemaking, Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, CC Docket No. 96-152, FCC 97-35, released February 7, 1997, ¶¶ 63-64 ("Electronic Publishing Order").

14 See AT&T Comments, filed September 4, 1996, at pp. 12-14 in Notice of Proposed Rulemaking, Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, CC Docket No. 96-152, FCC 96-310, released July 18, 1996.

Although the Commission recognized in its § 272 order that § 274 also referred to operational independence, it found that

> structural differences in the organization of the two sections suggest that the term 'operate independently' in section 272(b)(1) should not be interpreted to impose the same obligations on a BOC as section 274(b). In particular, while the enumerated requirements of section 274(b) may be interpreted to define the term 'operated independently' in that context, they do not define the term 'operate independently' as used in section 272(b).[15]

The Commission did not elaborate on this "structural" rationale or provide any other basis for its decision. AT&T does not believe that the Commission is bound to adopt precisely the same interpretation of "operate independently" in both sections 272 and 274.[16] It is clear, however, that the Commission's interpretation of § 272(b)(1) must take account of the specific restrictions Congress included in § 274(b), and must give a reasoned explanation for rejecting them in favor of a less restrictive interpretation under Section 272.

It is the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning."[17] Further, the Supreme Court has held that when the statutory provisions in question appear in "close proximity" or are "interrelat[ed]," this presumption is heightened.[18] Sections 272(b)(1) and 274(b) appear in close

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15 Order, ¶ 157.

16 See AT&T Reply, p. 17 n.40 (noting that "the phrase 'operate independently' has a different location and function in § 272 than it does in § 274").

17 E.g., Gustafson v. Alloyd Co., 115 S. Ct. 1061, 1067 (1995); Department of Revenue of Oregon v. ACF Indus., 114 S. Ct. 843, 845 (1994).

18 Commissioner of Internal Revenue v. Lundy, 116 S. Ct. 647, 655 (1996); see also Sullivan v. Stroop, 496 U.S. 478, 484 (1990) (fact that two welfare programs have a "substantial relation" is further evidence that "identical words used in different parts of the same act are intended to have the same meaning").

proximity in the text of the 1996 Act. Moreover, the two sections address almost precisely the same subject matter, requiring BOCs to provide telecommunications services through a "separate affiliate" in § 272, and a "separated affiliate" in § 274. Indeed, the provisions' overlap is so substantial that the Commission permits BOCs to use the same affiliate to provide services covered by both sections.[19]

Against this powerful evidence that Congress intended the Commission to interpret § 272(b)(1)'s "operate independently" requirement consistently with its reading of § 274(b), the Commission offers only its unelaborated contention that the "structure" of the two provisions differs. This appears to be a distinction without a difference. In any event, the Commission's terse explanation of its rationale is not sufficient to overcome the strong presumption that the phrase "operate independently" must be interpreted consistently in sections 272 and 274.[20]

IV. The Commission Failed Adequately To Consider Or Distinguish Its Prior Interpretations Of The "Operate Independently" Requirement

Finally, the Commission's interpretation of § 272(b)(1)'s "operate independently" requirement cannot be reconciled with the interpretation that it gave that same phrase in its

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19 See Electronic Publishing Order, ¶ 110 ("[A] BOC may provide electronic publishing services and section 272 services through the same entity or affiliate.")

20 Order, ¶ 157. As the Order observed, some of the nine requirements specified in § 274(b)(1) appear to be duplicative of measures required in § 272(b), (c) and (e). Id. For example, § 272(b)(2) requires that BOCs and their § 272 affiliates keep separate books and records, while § 274(b)(1) imposes the same requirement as an element of "operational independence." Although the Commission generally should avoid adopting interpretations that would create overlapping statutory requirements, it also must take into account the canon of statutory construction that holds that identical words in the same statute have the same meaning, and must offer some reasoned basis for choosing one interpretive strategy over the other.

Computer Inquiry and cellular structural separation rules. In those regulations the Commission mandated that BOCs and their affiliates must "operate independently" by, among other things, "utiliz[ing] separate operating, marketing, installation, and maintenance personnel."[21] These prior interpretations were offered in contexts almost identical to that addressed by § 272, but impose significantly more stringent requirements than the instant order. Despite this apparent change in its views of operational independence, the Commission nowhere explains the basis for its departure from its prior findings.

It is a fundamental proposition of administrative law that

> A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.[22]

Thus, the courts have made clear that "an agency changing course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency" adopts that course in the first instance.[23] In the instant rulemaking, the Commission has not met

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21 See 47 C.F.R. §§ 22.903(b) & 64.702(c)(2). Notably, the Commission observed in the instant Order that its precedents require a Computer II affiliate to "have its own ... personnel" for these functions. Order, ¶ 171. This policy stands in sharp contrast to the Order's apparent suggestion that BOCs and their § 272 affiliates may be able to, in effect, perform certain core functions on a joint basis by contracting with another BOC affiliate. Although AT&T believes that such an interpretation would be inconsistent with the plain language of § 272(b)(1), as discussed above, if the Commission in fact seeks to permit such conduct, it must offer a reasoned basis for departing from its prior interpretations of the "operate independently" requirement.

22 Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807-08 (1973).

23 MVMA v. State Farm, 463 U.S. at 43.

its obligation to give a reasoned explanation for its failure to follow its settled interpretation of the term "operate independently."

CONCLUSION

For the foregoing reasons, the Commission should reconsider and clarify its First Report and Order in CC Docket No. 96-149, as set forth above.

Respectfully submitted,

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